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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAN MORALES, Attorney General of Texas, *et al.*,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC. *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Association of National Advertisers, Inc., (A.N.A.) respectfully submits this brief *amicus curiae* in support of respondents in this case. Letters of consent to the filing of this brief have been lodged with the clerk.

The Association of National Advertisers, Inc., the industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise both nationally and regionally. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of annual national and regional advertising expenditures in the United States.

As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of commercial speech as an integral component of the robust competition that powers a free market economy. As national advertisers, the members of A.N.A. are acutely aware of the costs and drawbacks of patchwork local regulation of the commercial speech process. When speakers seeking to communicate with an interstate audience are forced to comply with a series of overlapping, conflicting and burdensome state and local rules, two adverse speech consequences inevitably follow. First, the duty to comply with bureaucratic local speech regulations impedes effective communication by complicating and, often, precluding the most effective messages. Second, the cost of local tailoring imposes a significant and wholly unnecessary economic burden on the commercial speech process.

Where, as in this case, Congress has elected to establish uniform national standards governing a significant category of commercial speech in order to avoid the drawbacks imposed by patchwork local regulation, A.N.A. believes that deference to Congress' will requires preemption of state and local rules of law.

STATEMENT OF THE CASE

Although this case raises important questions of regulatory policy, it arises out of a simple dispute over the format of airline price advertisements. Given the complexity of current pricing arrangements in the airline industry, the base fare is often supplemented by variable costs, such as customs fees, baggage transit fees, airport departure fees, taxes, fuel surcharges and security costs. Moreover, time and use restrictions designed to tie prices to marginal cost often complicate the fare structure.

Many airlines advertise the base fare separately and disclose the additional costs and fees, as well as any user restrictions, elsewhere in the advertisement. The National

Association of Attorneys General (NAAG), issued guidelines in 1987 requiring the "bundling" of all cost and user information into the same space in an advertisement. The Attorney General of Texas threatened prosecution of five airlines under state consumer protection laws unless they adopted the "bundling" format for interstate rate advertising in Texas. Full disclosure of the relevant additional information elsewhere in the advertisement was explicitly deemed inadequate. (J.A. at 152a).

The airlines resisted, obtaining injunctive relief on preemption grounds against state prosecution. *TWA* v. *Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S.Ct. 308 (1990). This appeal followed in due course. See *TWA* v. *Morales*, 924 F.2d 1055 (5th Cir. 1991).

Thus, the actual issue that divides the parties is a narrow one. All agree that it is both necessary and proper to inform consumers that additional costs and use restrictions exist. The only disagreement is over whether the information may be "unbundled" from the base rate and disclosed elsewhere in the advertisement, or must be "bundled" with the base rate.

SUMMARY OF ARGUMENT

Congress, in enacting the Airline Deregulation Act of 1978, expressly preempted all state laws "relating to rates, routes and services"[1] of interstate airlines. Such an express displacement of state law preempts attempts by the states to dictate the form and content of airline rate advertising for four reasons.

First, the literal text and context of the 1978 Act makes clear that its "plain meaning" was to prevent the states from interfering in the free market process by which airline rates, routes and services are determined. Since robust price advertising is critical to effective price competition, efforts to control the advertising process inevitably impact on the

1 49 U.S.C. app § 1305(a)(1)

competitive rate structure itself. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987).

Second, the "plain meaning" of the express preemption provision is confirmed by the construction afforded it by the United States Department of Transportation (DOT), the agency vested with responsibility for implementing Congress' will. *Chevron, U.S.A. Inc.* v. *NRDC Inc.*, 467 U.S. 837 (1984). DOT has consistently construed the relevant statutory language as preempting state attempts to dictate the form and content of airline rate advertising. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

Third, preemption is particularly appropriate in a setting, as here, where Congress seeks to achieve uniform, nationwide rules governing speech. Congress' desire to assure uniform national standards governing the regulation of speech has consistently been at the core of the Court's preemption cases. Eg. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953); *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Michigan Canners & Freezers* v. *Agricultural Board*, 467 U.S. 461 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *City of New York* v. *F.C.C.*, 486 U.S. 57 (1988). See also *Edgar* v. *MITE Corporation*, 457 U.S. 624, 630-640 (1982).

Finally, this Court has been particularly sensitive to the need for preemption in settings where, as here, Congress has expressed an intention to impose uniform rules of conduct on a significant economic activity in order to permit national market forces to operate free from local distortions. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478 (1990); *FMC* v. *Holliday*, 111 S.Ct. 403 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988); *Shaw* v. *Delta Airlines*, 463 U.S. 85, 91 (1983); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986).

ARGUMENT

STATE LAWS PURPORTING TO GOVERN THE FORM AND CONTENT OF AIRLINE RATE ADVERTISING ARE PREEMPTED BY CONGRESS' DECISION TO DISPLACE ALL STATE LAWS "RELATING TO RATES, ROUTES AND SERVICES" OF INTERSTATE AIRLINES

INTRODUCTORY STATEMENT

Tension exists between state laws purporting to mandate the form and content of interstate airline rate advertising and Congressional regulatory policy, strongly committed since 1978 to robust price competition in the airline industry. In theory, of course, no collision exists between robust price competition and sensible consumer protection laws. In practice, however, over-zealous application of multiple, potentially inconsistent state laws governing the form and content of airline rate advertising inhibits robust price competition in at least four ways.

First, the very fact of requiring compliance by interstate airlines with a patchwork of state and local laws with different definitions of what counts as "deceptive"; different rules as to mandatory disclosure; and different standards as to required format, dramatically raises the cost and lowers the effectiveness of competitive price advertising.[2] Tailoring an

2 As Texas notes, the NAAG Guidelines are merely "general enforcement policies" and are fully subject to "variations in individual state and common law". Although state consumer protection laws uniformly decry "deception", they vary widely in the specific meaning of the term, to say nothing of requirements on prophylactic disclosure and required format.

inherently interstate message to the vagaries of local consumer protection practice, even if one assumes that the varying rules are not mutually contradictory, is expensive. A.N.A. members have learned the economic fact of life that the greater the diversity of local speech rules, the less speech can be bought with the same advertising dollar. Since price advertising fuels price competition, the adverse impact on price competition of requiring burdensome compliance with multiple state and local speech standards is obvious.

Even more importantly, requiring compliance with differing state rules on the content and form of airline price advertising makes it impossible to develop a uniform national vocabulary that will facilitate comparison shopping by consumers in different states. This Court has explicitly noted the destructive effect on national comparison shopping caused by differences in state laws mandating the form and content of commercial speech. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977).

Third, when bureaucrats make prophylactic rules about the content and form of price advertising and insist upon mechanical compliance with their rules, an important message may be rendered literally unspeakable. For example, the complex interplay between base-rates, surcharges, departure fees, taxes and restrictions may cause the total cost of an airline ticket to vary depending on the number and location of intermediate stops and the time of use. The logical method of conveying competitive price data in such a fluid setting is to "unbundle" the "constant" base-rate from the "variable" surcharges, fees, taxes and restrictions. If, however, state law forbids such "unbundling" by requiring that variable costs and restrictions be discussed simultaneously and identically with the "fixed" base rate, (See J.A. 152a), it becomes impossible, as a practical matter, to craft a readable competitive rate advertisement for a route involving differing intermediate stops and varying time of use restrictions.

Finally, requiring the transmission of information in a bureaucratically mandated format often obscures and con-

fuses the central message of an advertisement, draining it of persuasive impact and diluting its informational value. *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954). Every would-be communicator, whether a lawyer, a teacher, a judge or an advertiser, knows that a fine line must be walked between too much and too little content in an effort to craft an effective message. Moreover, every would-be communicator realizes that the format and organization of the content plays a significant role in its informational value. Airline rate advertising is no exception. When bureaucrats require airlines to "bundle" all restrictions and costs with the base price in an effort to assure full disclosure, they inadvertently sacrifice effectiveness without materially enhancing the consumer's knowledge.[3]

Of course, recognizing that tension exists between the bureaucratic ideal of total, simultaneous disclosure and the practical necessities of effective competitive rate advertising does not mean that airline rate advertising should be free from regulation. *Amicus* recognizes the wisdom of reasonable regulatory activity aimed at assuring informed consumers. But the tension that exists between multiple bureaucratic overregulation of rate advertising and robust rate competition makes clear that drawing a thoughtful and uniform regulatory line between "too much" and "not enough" regulation of airline rate advertising is among the most sensitive and important judgments confronting airline regulators in the

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3 *Amicus* agrees, of course, that information on use restrictions and additional costs must be made available to the consumer. The only issue raised by this case is whether state bureaucrats can insist on a particular format.

The point is made most forcefully in a letter, dated November 14, 1988, from several Attorneys General to Pan Am:

> *It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement.* The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference. (emphasis added). J.A. at 152a.

Why not?

post-1978 era of free competition. The precise issue posed by this case is whether the line between "too much" and "too little" regulation of airline rate advertisements is to be drawn by federal regulatory officials on a uniform, national basis, with due regard for Congress' mandate to increase price competition, or whether each state and locality may draw the balance for itself, without regard for the effect on national transportation policy.

A. The "Plain Meaning" of the Congressional Text Defining Preemption

Texas argues that it is empowered to second-guess federal regulators in drawing the balance between too little and too much regulation of airline rate advertising.[4] The United States Department of Transportation (DOT), heir to the regulatory authority initially vested in the Civil Aeronautics Board (CAB), argues that its statutory duty to prevent "deceptive" airline practices vests it with exclusive authority to draw the appropriate regulatory balance.[5] The dispositive

4 Texas suggests that no difference exists between the relevant state and federal norms governing airline rate advertising, since both bar "deception". Petitioner's Br., p. 19. However, this case illustrates the range of meanings the legal conclusion "deceptive" can have. The precise issue in this case, whether "bundling" must be required as a prophylactic protection against deception, is an issue on which strong disagreement exists between state and federal authorities. Indeed, Texas candidly concedes that:

> DOT has consistently sided with the airline respondents in opposing regulation of airline advertising *and by permitting the exact practices which the state would prohibit.* (emphasis added). Petitioner's Br., p. 27.

5 The CAB's power to regulate deceptive advertising practices flowed from § 102(a)(7) of the Federal Aviation Act of 1958, 49 U.S.C. app. § 1302(a)(7). It was transferred to the Department of Transportation in the Civil Aeronautics Board Sunset Act of 1984. Pub. L. No. 98-443, 98 Stat. 1703. See also § 411(a) of the Federal Aviation Act, 49 U.S.C. app. § 1381(a).

question for this Court[6] is: What did Congress intend[7] when it enacted § 105(a) of the Airline Deregulation Act of 1978?[8]

The pre-1978 answer to the question is clear. From 1938-1978 airlines were not merely shielded from competition, but were affirmatively discouraged from competing. Not surprisingly, during the non-competitive era, the power to regulate airline rate advertising was shared between the Civil Aeronautics Board and state authorities. *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976); 49 U.S.C. § 1506. During a period when the anti-competitive effect of over-regulation of price advertising was of no concern to Congress, the CAB or the airline industry, Congress was unconcerned with the development of uniform, national rules governing airline rate advertising.

In 1978, however, widespread dissatisfaction with the bloated cost structure and inadequate service record of an airline industry almost totally insulated from competition led Congress to alter the regulatory landscape dramatically. See Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 Transp. L. J. 91 (1979); See also Dempsey and Thoms, *Law and Eco-*

6 State attempts to regulate the form and content of interstate airline rate advertising also raise questions under both the First Amendment and the Commerce Clause. Neither constitutional question is before this Court in this proceeding.

7 When Congress legislates pursuant to its enumerated powers, it may, pursuant to Article VI, cl. 2, elect to displace state law that interferes with the full attainment of Congressional purpose. *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.).

8 The Airline Deregulation Act of 1978 (Pub. L. No. 95-504, 92 Stat. 1705) is codified at 49 U.S.C. app. § 1301-1552 (1982 & Supp. V 1987). The express preemption consequences of the Act are set forth in § 105(a)(1), codified at 49 U.S.C. app. § 1305(a)(1), which expressly preempts all state laws "relating to rates, routes and services". The text of § 105(a)(1) is set out *infra* at p. 10.

Significantly, § 105(a)(2) explicitly saves from preemption "proprietary powers and rights" of local airport operators. No such savings clause exists in the area of advertising regulation. See *New England Legal Foundation* v. *Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989)

nomic Regulation in Transportation (1986). In place of a system that had shielded airlines from competition, Congress mandated a regime of robust competition in the area of "rates, routes and services".

The shift to a regulatory philosophy in which rates were to be set by vigorous free market competition and not by bureaucrats required a corresponding shift in the allocation of power over the form and content of airline rate advertising. Congress recognized that robust price competition depended on effective price advertising which, in turn, depended on the existence of a sensible set of uniform, national rules governing the interstate airline advertising process. Accordingly, in place of the pre-1978 system of shared power, Congress expressly imposed a blanket preemption provision, stating:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation. 49 U.S.C. § 1305(a)(1).

At the same time, Congress vested power in the Civil Aeronautics Board (a power now exercised by the Department of Transportation) to prevent:

> . . . "unfair, deceptive, predatory or anticompetitive practices that would tend to allow one or more air carriers unreasonably to increase prices, reduce services or exclude competition in air transportation". 49 U.S.C. § 1302(a)(7). See also 49 U.S.C. app. § 1381 (a).[9]

Thus, the "plain meaning" of Congress' language compels a finding that state laws purporting to mandate the form and content of airline rate advertising are expressly preempted.

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9 Congress continued, as well, power to deal with deceptive practices dating from 1938. 49 U.S.C. app § 411(a)

Congress may preempt state law in one of three ways: (1) literally, by describing the precise practice to be preempted *in haec verba*; (2) textually, by including the preempted practice within a broad functional or categorical description of the statute's preemptive scope; and (3) impliedly, by enacting legislation that connotes an unarticulated intention to preempt the practice at issue.

In the absence of any provision expressly articulating Congress' intent to displace state law, this Court has been understandably reluctant to infer preemption. Eg., *Florida Lime and Avocado Growers* v. *Paul*, 373 U.S. 132 (1963); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). But where, as here, Congress has expressed its intention to preempt state law both literally and in broad functional terms, this Court has enforced the text's "plain meaning", despite efforts to impose an unrealistic requirement of descriptive particularity. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478 (1990); *FMC* v. *Holliday*, 11 S.Ct. 403 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. U.S. 825 (1988); *Pilot Life Ins. Co.* v. *Deadaux*, 481 U.S. 41 (1987); *Shaw* v. *Delta Airlines*, 463 U.S. 85, 91 (1983) (broadly construing the phrase "relate to" in the context of ERISA preemption).

The phrase "relating to rates" is a literal description of the delivery of price information to the consumer. The dictionary definition of "relating to" is "to stand in some relation, to have relationship; to pertain" Webster's Int'l Dictionary, 2d ed., p. 2102 (1951). If a consumer were to call an airline directly and ask the price of a ticket to Honolulu, can it be disputed that the clerk's answer is "related to rates"? Given the complexity of the airline rate structure, the clerk would be obliged to ask a series of questions (date, hour, month, length of stay, etc.), but the entire exchange would unquestionably "relate to rates". Advertising is, of course, nothing more than a generalized transmission of information to prospective consumers. If a face-to-face request for price information elicits a response that "relates to rates", it is difficult to understand why a generalized transmission of the same

information to the public does not similarly "relate to rates." Texas' argument, therefore, seeks to substitute "directly governs rates" for the literal meaning of the phrase actually used by Congress.

Texas argues, nevertheless, that the broad categorical phrase used by Congress to describe the preemptive effect of the Airline Deregulation Act of 1978—"relating to rates, routes or services"—does not describe *in haec verba* state laws regulating the form and content of airline rate advertising. Accordingly, argues Texas, while state laws directly altering the rate structure would be literally preempted, state laws that merely regulate the flow of information about rates do not "relate to rates" within the meaning of Congress. See *Abrams* v. *Trans World Airlines, Inc.*, 728 F.Supp 162 (S.D.N.Y. 1990). But see *Abrams* v. *Trans World Airways, Inc.*, 525 N.Y.S.2d 1 (First Dept. 1991) (dismissing enforcement proceeding on preclusion grounds).

However, once Congress determined in 1978 that airline rates themselves should be set by free market competitive forces and not by administrative fiat, rate advertising became the key to the robust price competition necessary to the "setting" of a free market rate. Since regulation of rate advertising directly impinges on the "setting" of rates in a free market economy, state laws purporting to control the content and form of airline rate advertising "relate to rates" even in the narrow sense of the term advanced by Texas.

If, for example, Texas were to ban airline rate advertisements completely,[10] relying instead on an official state airline price directory, the advertising ban would unquestionably "relate to rates" (even in the narrowest sense of the phrase) since the ban would eliminate advertising as a medium of price competition, inevitably resulting in higher, non-

10 Such a ban would unquestionably violate the First Amendment. Eg. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)

competitive rates. The regulations at issue in this case differ only in degree from such a complete ban.[11]

In effect, Texas argues that preemption can occur only when Congress utilizes a literal description of a particular practice.[12] Congressional efforts to effect preemption more broadly by describing generic or functional categories of preempted behavior would be unavailing. Such an approach to statutory construction, which confuses fidelity to the Congressional text with a slavish insistence upon a particular, literal command, would dramatically weaken Congress as a significant policy-making institution. Whenever Congress legislates, it necessarily utilizes functional or categorical descriptions of its legislative ends. Indeed, sophisticated communication of any kind is impossible without the use of abstract, descriptive phrases that are intended to include relevant specific practices. A grammar consisting solely of proper nouns is hardly an adequate vehicle for a legislature—or anyone else—in a complex democracy.

Thus, while *amicus* agrees that in the absence of textual support this Court should be wary of implying a Congressional intent to displace state law, the so-called presumption against preemption in non-textual settings should not be transformed into a mechanical demand for literal particularism in Congressional texts expressly imposing preemption. Where, as here, Congress expressly codifies its desire to preempt state law in broad, functional terms, a showing that the state practice at issue exerts a significant adverse impact on Congress' regulatory scheme brings the state practice within the "plain meaning" of the express preemption provision and should, *amicus* believes, end the discussion. See *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478 (1990); *FMC* v. *Hol-*

11 The relationship between price advertising, robust price competition and the setting of market rates is well understood. Eg., Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. Law & Econ. 337 (1972); Cady, *An Estimate of the Price Effects of Restrictions on Drug Price Advertising*, 14 Econ. Inquiry 493 (1976).

12 As *amicus* has shown, even the requirement of literalness has been met in this case. See *supra* at p. 11-12.

liday, S.Ct. 403 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. U.S. 825 (1988); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987); *Shaw* v. *Delta Airlines*, 463 U.S. 85, 91 (1983) (broadly construing the phrase "relate to" in the context of ERISA preemption).

Finally, Texas argues that 49 U.S.C. 1506, dating from 1958, which provides:

> Nothing contained in this chapter shall in any way abridge or alter *the remedies* now existing at common law or by statute, but the provisions of this chapter are in addition to such *remedies*. (emphasis added).

connotes an intention to permit states to set varying regulatory standards governing airline rate advertising. But such an argument fails on two levels.

First, § 1506 dates from the Federal Aviation Act of 1958. Whatever its pre-1978 import, the passage of the Airline Deregulation Act of 1978, with its express pre-emption language, overrides the earlier provision.

Second, by its literal terms, § 1506 merely preserves state "remedies", not the power to enunciate multiple state substantive standards. This is not a case involving an effort to use supplemental state "remedies" to enforce substantive federal standards. See *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966); *Farmer* v. *United Bro. of Carpenters & Joiners*, 430 U.S. 290 (1977) (preempting state substantive law, but permitting state courts to enforce federal substantive standards). Rather, it is an attempt to enforce an independent set of substantive state norms. See *Franklin National Bank* v. *New York*, 347 U.S. 373 (1947); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982). When Congress wished to preserve such an arena for non-uniform state substantive regulation in the 1978 Act it did so explicitly. 49 U.S.C. § 1305(a)(2) (preserving "proprietary" rights of airline operators from preemption).

Accordingly, the Circuits are correct in holding that § 1506 does not override Congress' clearly articulated desire for uniform, federal rules governing airline "rates, routes and services". *O'Carroll* v. *American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 109 S.Ct. 3158 (1989); *Hingson* v. *Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984); *French* v. *Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); *Illinois Corporate Travel* v. *American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989).

B. The Text's "Plain Meaning" is Confirmed By the Construction Adopted By the Administrative Agency Vested With Responsibility for Implementing Congress' Commands

Amicus believes that the phrase "relating to rates" clearly preempts state efforts to regulate the form and content of rate advertising since price advertising is literally "related to rates" because it so directly impacts on the market process by which airline rates are "set". Indeed, the text's "plain meaning" is confirmed by the reading of the phrase adopted by the Department of Transportation (DOT), the agency vested since 1984 with responsibility for implementing Congress' regulatory program. *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

In *Chevron*, this Court recognized that the necessary use of general language in Congressional statutes would occasionally result in situations where reasonable persons could disagree over a text's application to a specific practice. In such situations, this Court held that substantial deference was due to the plausible reading of the Congressional text adopted by the administrative agency vested with responsibility for implementing Congress' will.

Amicus believes that this is not a *Chevron* situation, because the text's "plain meaning" is manifest. But even if an ambiguity existed, DOT's consistent reading of § 105(a)(1) as preempting state laws purporting to mandate the form and content of airline rate advertising should be "dispositive" in

resolving the ambiguity. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

DOT's judgment that multiple state over-regulation of airline rate advertising constitutes a danger to the robust price competition mandated by Congress is precisely the kind of exercise of informed expertise that this Court found conclusive in *Chevron* and its progeny. As the administrative agency responsible for implementing Congress' plan, DOT is both functionally and democratically best-suited to resolving any doubt about whether state regulation of rate advertising "relates to" rates—functionally, because DOT possesses the expertise to measure the impact of state advertising regulation on the market processes by which rates are set; democratically, because DOT's reading of the statute is subject both to Presidential supervision and immediate alteration by Congress.

From the outset of this controversy, DOT (and the Federal Trade Commission) have construed § 105(a)(1) as preempting state efforts to regulate the form and content of airline rate advertising. On October 19, 1987, prior to the adoption of the NAAG Guidelines, DOT notified NAAG that the guidelines were preempted. *TWA* v. *Mattox*, 897 F.2d 773, 784 (5th Cir.), *cert. denied*, 111 S.Ct. 308 (1990). On March 2, 1988, after the adoption of the NAAG Guidelines, DOT notified the Attorney General of Texas that state regulation of airline rate advertising as contemplated by the guidelines was preempted and that conduct forbidden by the guidelines had been "specifically permitted by DOT". *Id* at 784. In 1989, seeking to fulfil its mandate to develop uniform rules governing airline advertising, DOT published proposed rules governing airline advertising. 54 Fed. Reg. 31,052 (1989) (Tentative Rules Governing Airline Rate Advertising), that would supplement and modify existing federal regulations in the area. 14 C.F.R. §§ 201, 221, 254, 380, and 399 (1990).[13]

13 The proposed regulations remain pending. 56 Fed. Reg. 53,614 (October 21, 1991).

Significantly, DOT has specifically ruled on two occasions that airlines may "unbundle" international departure taxes, customs fees, immigration fees and security surcharges from base fares in connection with rate advertisements—a practice that flatly contradicts the NAAG Guidelines. DOT Orders 85-12-68; 89-4-25. See *Alaska* v. *United States Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989). Finally, in this proceeding, DOT has vigorously maintained its consistent position that § 105(a)(1) expressly preempts state attempts to control the form and content of airline rate advertising.[14]

Thus, unlike settings in which an agency has merely adopted a "litigating position",[15] DOT's consistent reading of § 105(a)(1) and its repeated exercise of regulatory authority warrant *Chevron* deference.

In *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, *supra*, this Court, citing *Chevron*, unanimously held that the FDA's decision to construe the Public Health Services Act as permitting parallel state and federal regulation of blood plasma centers "is dispositive on the question of . . . intent to preempt unless . . . the agency's position is inconsistent with clearly expressed congressional intent". 471 U.S. at 714. This case is the flip side of *Hillsborough*. Just as the FDA's reading of the governing statute as precluding preemption was "dispositive", so too is the DOT's reading of § 105(a)(1) as mandating preemption.

14 Texas argues that, unlike DOT, the Civil Aeronautics Board did not view § 105(a)(1) as preempting state regulation of airline rate advertising. But Congress terminated the CAB in 1984, transferring its authority over airline rate advertising to the Department of Transportation. Texas candidly discloses that, from the beginning, DOT has construed § 105(a)(1) as preempting state efforts to control the form and content of airline rate advertising. Petitioner's Br., p. 22, n. 12.

Of course, for *Chevron* purposes, it is the plausible construction of the current administrator that commands deference. *Rust* v. *Sullivan*, 111 S.Ct. 1759, 1769 (1991).

15 See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988).

C. Preemption is Particularly Appropriate in Settings Where Congress Seeks to Assure Uniform Legal Standards Governing Speech

This Court has repeatedly recognized that when, as here, Congress regulates in areas involving speech, Congress' desire to establish uniform, nationwide rules governing speech preempts state and local attempts to alter the Congressional balance. Indeed, Congress' desire to assure uniform national standards governing the regulation of speech has consistently been at the core of the Court's preemption cases. Eg. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953); *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Michigan Canners & Freezers* v. *Agricultural Board*, 467 U.S. 461 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *City of New York* v. *F.C.C.*, 486 U.S. 57 (1988). See also *Edgar* v. *MITE Corporation*, 457 U.S. 624, 630-640 (1982).

In the commercial speech context at issue in this case, this Court has long respected Congress' intention to impose uniform national standards when it regulates commercial speakers. For example, in *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), this Court held that the federal statute authorizing national banks to accept savings deposits preempted New York's limitation on the use of the word "saving" or "savings" in bank advertising. Similarly, in *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), this Court ruled that federal weight labeling rules preempted California's attempt to impose more stringent weight labeling standards, precisely because differing state rules would interfere with a uniform national communication system. A similar commitment to uniform national standards governing speech doomed Oklahoma's attempt to regulate liquor advertising on local cable television in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

In the context of labor relations, in *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953), this Court held that the National Labor Relations Act impliedly preempts state common law remedies for injunctive relief against peaceful recognitional picketing. In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959), this Court held that state common law damage claims arising out of peaceful picketing activity were, likewise, impliedly preempted by the NLRA. In *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964), the *Garner-Garmon* rule was applied to preempt state common law damage claims for unlawful secondary picketing activity. Finally, in *Machinists* v. *Wisconsin Employment Rel. Comm'n*, 427 U.S. 132 (1976), this Court ruled that state laws forbidding concerted refusals to work overtime were preempted, as well.[16]

In the context of broadcast regulation, this Court has also respected Congress' desire for uniform national standards when national communications are at issue. For example, in *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959), this Court ruled that state common law actions for libel against broadcasters were preempted by the Federal Communications Act. Similarly, in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), this Court ruled that federal law preempted

16 See also *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963); *Michigan Canners & Freezers* v. *Agricultural Board*, 467 U.S. 461 (1984).

In *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), the Court declined to wholly preempt claims for libel in the context of a labor dispute. Instead, the Court effected a partial preemption that displaced state libel law in private labor settings if it permitted recovery short of a showing of malice identical to the constitutional standard for political settings established in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). The net result of *Linn* was to establish highly protective uniform national legal standards governing libel in a labor context, but to rely on state courts to apply them. The Court followed the identical path in connection with suits for intentional infliction of emotional distress. *Farmer* v. *United Bro. of Carpenters & Joiners*, 430 U.S. 290 (1977).

Oklahoma's attempt to ban liquor advertising from local cable television. Most recently, in *City of New York* v. *F.C.C.*, 486 U.S. 57 (1988), New York City's attempt to set technical standards for local cable television was held preempted by the Cable Broadcasting Act.

Perhaps the most dramatic examples of the role of preemption in assuring a uniform national standard in the area of speech and association have taken place in the national security area. In *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), a Pennsylvania Alien Registration statute imposing significant restrictions on the civil liberties of aliens was held preempted by the Federal Alien Registration Act because the Pennsylvania statute altered the balance between freedom and regulation set by Congress. Similarly, in *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1950), the Smith Act was held to preempt attempts by the states to prosecute for sedition against the United States.

Thus, DOT's construction of § 105(a)(1) as reflecting a Congressional desire for uniform, national rules governing regulated speech is not only consistent with the statutory text and the statute's manifest purpose, it is consistent, as well, with settled Congressional tradition.

D. Preemption is Particularly Appropriate Where, As Here, Congress Has Indicated a Desire to Provide a Uniform Environment Within Which Market Factors May Operate

Whenever Congress has manifested a desire to impose uniform nationwide rules governing significant economic behavior, this Court has given full scope to Congress' decision to displace state standards that threaten to introduce economic distortions into the uniform scheme.

For example, in the cases charting the preemptive effect of ERISA, culminating in *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478 (1990), this Court recognized that Congress wished to establish uniform, nationwide rules governing the administrative cost structure of ERISA pension plans in order to assure that employers would not reflect state cost variations by altering employee benefits and, thus, create unintended market consequences. Accordingly, state rules of law with the capacity to alter the administrative cost structure of an ERISA plan have been deemed preempted, even when they are explicitly designed to assist employees in enjoying the plans. Eg. *Ingersoll-Rand Co.* v. *McClendon*, *supra*; *FMC* v. *Holliday*, 111 S.Ct. 403 (1990); *Mackey* v. *Lanier Collection Agency & Service Inc.*, 486 U.S. 825 (1988).

Even in the absence of a broad express preemption provision, such as the provision present in this statute and in ERISA, this Court has carefully preserved Congress' decision to establish uniform national standards governing particular economic activity by preempting state rules that threaten to introduce non-uniform legal duties. Thus, in *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), this Court recognized that Congress intended to establish uniform nationwide standards governing abandonment of rail lines by interstate carriers. Accordingly, the Court ruled that Congress had preempted Iowa's common law cause of action for damages for wrongful abandonment. See also *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971).

Similarly, in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982), this Court recognized that Congress' desire to assure uniform market conditions affecting savings and loan associations preempted California's attempt to restrict due-on-sale clauses in California mortgages.

Most dramatically, in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) and *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986), this Court held that Congress' desire to leave an area "to be controlled by the free play of economic forces" acted to preempt state laws that artificially distorted those market forces.

In this case, the driving force behind Congress' enactment of the Airline Deregulation Act of 1978 was its desire to permit air fares to be "controlled by the free play of economic forces". Since those "forces" cannot operate without robust

price competition, and since robust price competition depends upon the existence of sensible, uniform national rules governing the advertising process, the reading of the statute by the Fifth Circuit in *Trans World Airlines* v. *Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S.Ct. 308 (1990) and by the DOT as preempting state efforts to control the form and content of airline rate advertising is consistent the statute's literal text, its context and with settled Congressional practice.

CONCLUSION

For the above-stated reasons, the decision of the court below should be affirmed.

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